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THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Elegant Headwear Co., Inc.

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Serial No. 76605639

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Myron Amer of Myron Amer, P.C. for Elegant Headwear Co.,  
Inc.

Rebecca L. Gilbert, Trademark Examining Attorney, Law  
Office 113 (Chris Doninger, Managing Attorney).

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Before Seeherman, Holtzman and Kuhlke, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Elegant Headwear Co., Inc. has appealed from the  
final refusal of the Trademark Examining Attorney to  
register the mark shown below for "children's ambidextrous  
gloves."<sup>1</sup>

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<sup>1</sup> Application Serial No. 76605639, filed August 4, 2004,  
asserting first use and first use in interstate commerce on  
January 12, 1995.



The Examining Attorney has refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark MAGIC GLOVE, with the word GLOVE disclaimed, previously registered for "fashion gloves for youths,"<sup>2</sup> that, as used on applicant's goods, it is likely to cause confusion or mistake or to deceive. The Examining Attorney has also required, pursuant to Section 6(a) of the Trademark Act, 15 U.S.C. §1056(a), that applicant submit a disclaimer of exclusive rights to ONE SIZE FITS ALL and STRETCH GLOVES and STRETCHES TO ALL SIZES FOR A SUPER FIT apart from the mark as shown.

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<sup>2</sup> Registration No. 2090700, issued August 26, 1997. Section 8 & 15 affidavits accepted and acknowledged.

The appeal has been fully briefed. Applicant did not request an oral hearing.

We turn first to the requirement for a disclaimer. Section 6(a) of the Trademark Act provides, inter alia, that the Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable. Section 2(e)(1) of the Act prohibits the registration of a mark that is merely descriptive of the identified goods.

In the first Office action, the Examining Attorney required that applicant submit a disclaimer of ONE SIZE FITS ALL and STRETCH GLOVES and STRETCHED TO ALL SIZES FOR A SUPER FIT. The Examining Attorney subsequently explained that the required disclaimer used the word STRETCHED because applicant's original drawing, later amended, was so smudged that she was unable to ascertain that the lettering was actually STRETCHES. In response to this disclaimer requirement, applicant submitted a disclaimer (in the response filed July 18, 2005) of ONE SIZE FITS ALL and STRETCH GLOVES and STRETCH TO ALL SIZES FOR A SUPER FIT. We note that the disclaimer used the word STRETCH TO ALL SIZES FOR A SUPER FIT, rather than the required STRETCHED TO ALL SIZES FOR A SUPER FIT. The Examining Attorney subsequently required a disclaimer of STRETCHES TO ALL SIZES FOR A SUPER FIT, but applicant then argued against a

disclaimer of STRETCH, in both its request for reconsideration and its briefs. It appears to us that applicant is not aware that the problem with its offered disclaimer is that it has used the word STRETCH in the TO ALL SIZES FOR A SUPER FIT phrase, while the Examining Attorney has required the word STRETCHES to conform to the word used in the mark. Rather it appears that applicant is under the impression that the issue is whether the word STRETCH, in the phrase STRETCH GLOVES, should be disclaimed, and that it does not realize that it had offered a disclaimer of STRETCH GLOVES previously.

Because applicant's arguments with respect to the disclaimer relate only to the word STRETCH, and because applicant has already disclaimed exclusive rights to ONE SIZE FITS ALL, GLOVES and STRETCH [sic] TO ALL SIZES FOR A SUPER FIT, we will confine our comments to the appropriateness of the word STRETCH as it is used with GLOVES. In any event, we confirm that the words ONE SIZE FITS ALL, STRETCHES TO ALL SIZES FOR A SUPER FIT, and the word GLOVES are merely descriptive and/or generic and the requirement for a disclaimer of those words/phrases is appropriate.

We also find that the word STRETCH as it is used in applicant's mark is merely descriptive of the goods.

Applicant has submitted a copy of the patent for its gloves which describes them as follows (emphasis added):

A glove of stretch construction material so that one size fits all, in which the stretch is used to advantage for its utility to adjust for the discrepancy between the natural and glove construction positions of the thumb and the glove is therefore ambidextrous, so the glove used as a pair has four displays, in which an inside color surface is one, an outside contrasting color surface is two, and contrasting colors on one hand and then on the other hand are three and four, the change of the color surfaces being achieved by turning the glove inside out.  
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Using the stretch of "one size fits all" ...

The patent, thus, clearly states that a significant feature of applicant's goods is its ability to stretch so that "one size fits all." The stretch feature is also touted in applicant's mark with the phrases ONE SIZE FITS ALL and STRETCHES TO ALL SIZES FOR A SUPER FIT. A mark is merely descriptive if, as applied to the goods or services in question, it describes a significant ingredient, quality, characteristic, function, feature, composition, purpose, attribute, use or subject matter of such goods or services. In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986). Because the evidence shows that STRETCH

directly conveys information about a significant feature of applicant's gloves, namely, that they are made of a stretch fabric and have the ability to stretch to fit all sizes, STRETCH is merely descriptive of the goods, and must be disclaimed.

This brings us to the second basis for refusal of registration, that applicant's mark is likely to cause confusion with MAGIC GLOVE for fashion gloves for youths. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Applicant's goods are identified as children's ambidextrous gloves while the registrant's goods are identified as fashion gloves for youths. The Examining Attorney has submitted with her brief dictionary

definitions of "youth" and "children."<sup>3</sup> Youth is defined, inter alia, as "3b. Young people considered as a group." "Child" (plural "children") is defined, inter alia, as "1. a boy or girl from the time of birth until he or she is an adult." Gloves for "youths," thus, would include gloves for children. Moreover, fashion gloves would include ambidextrous gloves. The term "fashion gloves" is used to differentiate these gloves from work gloves or gardening gloves or the like. We also note that in the patent applicant has described its gloves as "reversible interchangeable stretch fashion glove" (emphasis added). Accordingly, the identification of "fashion gloves for youths" in the cited registration must be deemed to encompass applicant's "children's ambidextrous gloves." The du Pont factor of the similarity of the goods therefore favors a finding of likelihood of confusion.

Because the goods are legally identical, they must also be deemed to be sold in the same channels of trade to the same classes of consumers which, for gloves, would be the public at large. This factor, too, favors a finding of likelihood of confusion.

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<sup>3</sup> The American Heritage Dictionary of the English Language, 4<sup>th</sup> ed. © 2000. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

We turn next to a consideration of the marks, keeping in mind the following principles:

When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The word MAGIC is clearly the dominant word in the registered mark. The word GLOVE is generic, and therefore has no source-indicating value. In applicant's mark, the



descriptive phrases ONE SIZE FITS ALL and STRETCHES TO ALL SIZES FOR A SUPER FIT are, similarly, entitled to less weight. The words MAGIC STRETCH GLOVES are depicted in the largest letters, and are visually the most striking part of the mark. Here, too, the word GLOVES is entitled to less weight in the overall comparison of the marks because it is a generic term for the goods. The word STRETCH, as we have already discussed, is merely descriptive. The descriptive meaning of the word is emphasized by the design element, which is a visual representation of the act of stretching the material. While the prominent appearance of STRETCH makes it a noticeable part of the mark, and therefore may not be discounted, consumers are still likely to view MAGIC as the source-indicating part of the mark. Certainly when the mark is spoken it will be referred to as MAGIC STRETCH GLOVES without any emphasis on the word STRETCH; rather, STRETCH GLOVES will be considered as simply a phrase describing the product, namely, that they are stretch gloves. The connotations of the marks are identical, and they convey similar commercial impressions. Thus, despite the fact that there are visual differences in the marks caused by the additional descriptive phrases and the prominent display of the word STRETCH with the design element, these differences are outweighed by the

similarities in pronunciation, connotation and commercial impression. Consumers who are familiar with the registrant's gloves bearing the trademark MAGIC GLOVE are likely to view applicant's mark as merely a variation of that mark, and still indicating source in the same entity.

Finally, as noted above, the consumers for gloves are the general public. Gloves are relatively inexpensive items; they are not the type of goods that are purchased with a great deal of care or deliberation. Accordingly, consumers will not engage in extended thought or analysis as to whether the emphasis on the word STRETCH in applicant's mark might indicate a different source for the gloves than the source of gloves bearing the mark MAGIC GLOVE per se. On the contrary, they are likely to view the prominent placement of the word STRETCH as merely emphasizing the stretching feature of the gloves.

Applicant and the Examining Attorney have not discussed any of the remaining du Pont factors. To the extent that any are applicable, they must be considered to be neutral. After considering all of the relevant du Pont factors, we find that the use of applicant's mark for children's ambidextrous gloves is likely to cause confusion with MAGIC GLOVE for fashion gloves for youths.

**Ser No. 76605639**

Decision: The requirement for a disclaimer of ONE  
SIZE FITS ALL and STRETCH GLOVES and STRETCHES TO ALL SIZES  
FOR A SUPER FIT is affirmed. The refusal of registration  
on the ground of likelihood of confusion in view of  
Registration No. 2090700 is also affirmed.